

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2142

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MICHAEL FERRARA,

Petitioner/Appellant

v.

UNITED STATES OF AMERICA,

Respondent/Appellee

Docket No. 77-2142

BRIEF OF APPELLANT

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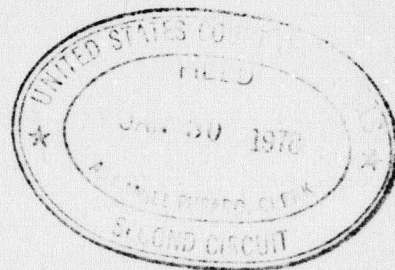


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INTRODUCTION

For all purposes hereinafter , the transcripts of proceedings before the Honorable Thomas C. Platt , United States District Judge , on 23 July 1976 , arraignment , shall be referred to as "T-I-" followed by the respective page number . "T-II-" shall refer to the transcript of proceedings before Judge Platt on 5 October 1976 , the withdrawal of the plea of not guilty and entry of the plea of guilty to the respective counts . "T-III-" shall refer to the sentencing procedures on 11 January 1977 . "T-IV-" shall refer to the bail proceedings of 19 March 1973 .

STATEMENT OF ISSUES ON APPEAL

- A. FAILURE TO PLACE DEFENDANT UNDER OATH IN RULE 11,
 FRCrP, PROCEEDINGS
- B. CONDUCT OF COUNSEL, ALLEGATIONS OF COERCION AND
 SENTENCE PREDICTIONS
- C. LACK OF FACTUAL BASIS FOR THE PLEA OF GUILTY

STATEMENT OF FACTS

On 5 October 1976, the Appellant appeared before the U.S. District Court for the Eastern District of New York, in an application to withdraw a plea of not guilty, and to enter a plea of guilty on three counts of two indictments for armed bank robbery.

Without placing the Appellant under oath, the Court examined him as under Federal Rules of Criminal Procedure 11 [T-II-5 through 15]. During the examination, the Court stated the outline of the charges and asked the Appellant about his plea on each, [T-II-7 through 9]. The Court then inquired as to the Appellant's specific involvement on each count. At no time did the Appellant specifically explain utilizing any weapon or personal force, violence or coercion. Nor did he state or admit that any accomplice utilized any weapon, force, violence or coercion. At one point, the Appellant specifically denied the use of "any instruments or weapons" [T-II-10].

Although answering in the negative as to whether any "promises or suggestions" were made as to any possible sentence, the Appellant indicated some confusion when the Court inquired as to whether his lawyer "expressed any opinion or made any prediction as to what sentence" the Court would impose.

The Appellant petitioned initially pro se under the provisions of U.S.C. §2255, and relief was denied. He now appeals that denial of relief to this Court.

STATEMENT OF THE CASE

Appellant was the Defendant below originally charged in Case Number 76-CR-190 (one bank) [T-II-4], superseded by 76-CR-190-S (two banks) [T-II-4], and Case Number 76-CR-471 (three banks) [T-II-4], in the United States District Court, Eastern District of New York, with the offenses of bank robbery and use of a dangerous weapon, variously in violation of Title 18, §§2113(a), (d) and (d) (2). The Defendant was represented by Michael F. Coiro, Esq., 118-18 Union Turnpike, Kew Gardens, New York 11415. The Honorable Thomas C. Platt, United States District Judge was presiding.

On 9 March 1976, Case Number 76-CR-190 was called up for arraignment, on the pending complaint. The Indictment was returned on 15 March 1976. On 19 March 1976, Defendant and counsel were formally arraigned on the charges, and a plea of not guilty was entered. Bail was set at that time in the sum of One Hundred Twelve Thousand Dollars (\$112,000.00). The case was then set for further hearing on 7 May 1976.

On 23 July 1976, the superseding Indictment, Case Number 76-CR-190-S was filed, and the Indictment in Case Number 76-CR-471 was filed. On the same date, Defendant, with counsel, was arraigned, and after advice of rights, a plea of not guilty was entered. Bail was continued. The cases were variously set for trial on 13 September 1976, and 1 October 1976, and alternatively 4 October 1976. On 1 October 1976, the cases were set for trial on 5 October 1976.

On the day of trial, the Defendant, with his retained counsel, appeared and withdrew his previously entered plea of not guilty, and entered a plea of guilty to Count One and Count Three of Case Number 76-CR-190-S, and withdrew his previously entered plea of not guilty in Case Number 76-CR-471 and entered a plea of guilty to Count One of that Indictment. The bail was continued and a presentence investigation was ordered.

On 10 December 1976, the case was set for sentencing, only to be reset at the instance of the defense until 11 January 1977. On 11 January 1977, the Defendant was adjudged guilty and sentenced on Counts One and Three of Case Number 76-CR-190-S, to a concurrent term of eighteen (18) years, to become eligible for parole under 18 U.S.C. §4205(b)(2) and to pay a fine to the United States in the sum of Ten Thousand Dollars (\$10,000.00). The remaining counts of the said Indictment were dismissed on motion by the Government. In Case Number 76-CR-471, the Defendant was sentenced to imprisonment for an additional period of seven (7) years, under 18 U.S.C. §4205(b)(2), and to pay an additional fine of Five Thousand Dollars (\$5,000.00); said sentence to run consecutively with the sentence of imprisonment imposed in Case Number 76-CR-190-S. The remaining counts of the said case were likewise dismissed on motion by the Government.

It is from the proceeding under Rule 11 on 5 October 1976 that this Appeal emanates.

The Defendant petitioned the United States District Court, Eastern District of New York, in the respective cases for a "Motion for Correction of An

Illegal and Erroneous Sentence Pursuant to Rule 35, Federal Rules of Criminal Procedure; for Violations of Rule 11 and the Constitution of the United States of America (But Not Limited Thereto); i.e., (Among Others). and Motion to Withdraw Pleas of Guilty in/of the Above Captioned Cases." U.S. District Court Judge Thomas C. Platt entered an Order to Show Cause under Case Number 77-C-1408, treating the Petition under Title 28, U.S.C. §2255, in an order dated 13 July 1977. The Government filed its Memorandum of Law in response to Motion to Withdraw a Guilty Plea (undated), David G. Trager, United States Attorney, Stephen Kimelman, Assistant United States Attorney, of counsel.

Undersigned counsel, on 19 August 1977, moved for leave to specially appear on behalf of Petitioner and on the same date, filed Petitioner's Reply to Government's Memorandum of Law in Opposition of Motion to Withdraw a Plea of Guilty. On 20 September 1977, Judge Platt entered Memorandum and Order denying relief. Motion for rehearing and Affidavit of Petitioner were filed, which Judge Platt took under advisement and further granted rehearing and leave of counsel to specially appear, pro hac vice, but on 20 October 1977, denied any further relief. Notice of Appeal was filed. Directions to the Clerk made on 8 November 1977, Stipulation for Deferred Appendix being made on 5 January 1978, to include said Directions.

**A. FAILURE TO PLACE DEFENDANT
UNDER OATH IN RULE 11, FRCrP, PROCEEDINGS**

Appellant, Defendant below, has challenged the failure of the trial judge to place him under oath in the Rule 11 proceedings. *U.S. v. Aldridge*, 553 F.2d 922 (5 CA 1977); *Bryan v. U.S.*, 492 F.2d 775, 781 (5 CA), cert.den. 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974).

The Fifth Circuit has made the procedure mandatory. The Second Circuit, however, has variously held the practice of the circuit is not to place the defendant under oath. *U.S. v. Saft*, 558 F.2d 1073 (2 CA 1977), at 1079; *U.S. v. Michaelson*, 552 F.2d 472 (2 CA 1977), at 477; *Del Vecchio v. U.S.*, 556 F.2d 106 (2 CA 1977), n.6 at 109.

Upon declaring the procedure mandatory, the Fifth Circuit pointed out in *Bryan v. U.S.* 492 F.2d 775, 780 (1974), that

. . . the Court's awareness of the increased incidence of attacks on guilty pleas based on breaches of those agreements compels us, in our supervisory capacity, to speak to the need for more adequate Rule 11 procedures, so that district courts will routinely explore this area in testing the voluntariness of pleas tendered.

In the more recent case of *U.S. v. Coronado*, 554 F.2d 166 (1977), the Fifth Circuit reiterated the importance of placing the defendant under oath, saying,

"In describing the procedure to be followed in accepting a guilty plea, we declared unequivocally, 'the defendant shall be placed under oath.' 492 F.2d at 781. We described our prescriptions as the 'minimum practice.' *Id.* More recently we have labeled the oath a 'critical requisite.' *Vandenades v. U.S.*, 523 F.2d 1220, 1224 (5 Cir. 1975)." *U.S. v. Coronado*, *supra*, at 174.

The court goes on to emphasize that, "the oath helps to eliminate the possibility that a defendant will believe that part of the process of implementing a plea bargain is to deny that such a bargain exists." *Id.*, at 174. It should be emphasized here that this very point is under consideration.

Cases cited above show that the Second Circuit has established a pattern of giving some leeway in assessing the failure to advise the defendant under Rule 11(c), particularly Rule 11(c)(5), which provides:

(5) that if he pleads guilty or nolo contendere, the Court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

The case at bar is a prime example of good faith effort to assure uniform and fair application of rules and precedent. Nevertheless, it has consumed a goodly portion of judicial consideration in both the district court and the appellate court. Compelling policy considerations lead to the conclusion that full mandatory requirements of the rule should be met as a "critical requisite." By so placing a defendant under oath during Rule 11 proceedings

and making full inquiry as mandated by the rule, allegations as to breach of promise or involuntariness [as in the instant case] would be rendered subject to scrutiny by the office of the U.S. Attorney for possible prosecution for false statement or perjury. This eventuality would serve to decrease frivolous and/or fraudulent allegations under §2255 and thus improve the difficult problem of overloaded court dockets with no decrease in essential protections for the defendant under law. See, *Stassi v. U.S.*, 439 F.Supp. 277 (D.N.J. 1976), at 281 where District Judge Stern held:

Furthermore, this opinion will be referred to the office of the United States Attorney for whatever action is deemed appropriate in light of the contradictory positions established by petitioner under oath. Affirmed, 559 F.2d 1210 (3 CA 1977).

In any case, possibly bad faith, fraudulent or frivolous motions under §2255 would more appropriately be investigated under the prosecuting arm of the Department of Justice, rather than through the perfection of a record and findings of fact by a hard-pressed judicial official. The problem which has been created by the conflict among the circuits need not continue; the uniformity of its application should be resolved, for the welfare of the federal judiciary as well as for the benefit of appellant/defendants. The Appellant prays that such resolution be taken now in favor of a mandatory requirement of being placed under oath for purposes of Rule 11 proceedings.

B. CONDUCT OF COUNSEL ALLEGATIONS OF
COERCION AND SENTENCE PREDICTIONS

Whether a waiver of constitutional rights is effective is an issue governed by federal standards. *Boykin v. Alabama*, 395 U.S. 238, at 243, 89 S.Ct. 1709. A plea of guilty embodies the waiver of several constitutional rights, including the right against self-incrimination, the right to confront one's accusers and the right to a trial by jury. *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). The strong presumption is against the validity of waivers of constitutional rights, and the acceptance of a plea of guilty must be approached with the utmost solicitude. *Von Moltke v. Gillies*, 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *Knight v. State of Minnesota*, 484 F.2d 104, 106 (8 CA 1973). The record must affirmatively show, under the totality of the circumstances, that the plea of guilty was voluntary, and it is the duty of the judge to establish by inquiry as thorough as the circumstances demand its constitutional validity. *Boykin v. Alabama*, supra, 395 U.S. at 242, 89 S.Ct. 1709; *Von Moltke v. Gillies*, supra, 322 U.S. at 723-724, 68 S.Ct. 316; *Smith v. Wolff*, 506 F.2d 556, 560 (8 CA 1974). *Griffith v. Wyrick*, 527 F.2d 109 (8 CA 1975). "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. U.S.*, 274 U.S. 220, 223.

It is well settled that an assertion to the contrary - - - that of a coerced plea - - - is open to collateral attack. *Marchibroda v. U.S.*, 368 U.S.

487, at 493. According to the U.S. Supreme Court, "It is equally clear that §2255 calls for a hearing on such allegations unless 'the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" [Emphasis added.] Fontaine v. U.S., 411 U.S. 213, 215 (1972). It is the position of the Appellant that his allegations should be heard on their merits in the absence of such a "conclusive" showing.

A mere prediction by counsel of the court's likely attitude on sentence, short of some implication of an agreement or understanding, is not ground for attacking a plea. *Domenica v. U.S.*, 292 F.2d 483, 485 (1 CA 1961). However, in the instant case, it is not entirely clear on the fact of the record that there was no suggestion by the defense counsel as to what the sentence would be. The relevant part of the exchange was as follows:

"The Court: Has your lawyer expressed any opinion or made any prediction as to what sentence the Court will impose?

The Defendant: Predictions?

The Court: Yes?

The Defendant: Not really. Really wide predictions.

The Court: But he hasn't made any prediction what sentence will be imposed?

The Defendant: No.

Although the Appellant responded negatively, it has been held that even where the answer to such an inquiry denies the existence of a plea bargain,

it is not to be considered conclusive against such claim. The real possibility that fear that a truthful response might jeopardize the bargain may well produce an answer that is false. *Crawford v. U.S.*, 519 F.2d 347 (4 CA 1975); *Walters v. Harris*, 460 F.2d 988 (4 CA 1972), at 992, cert.den. 409 U.S. 1129; *U.S. v. Hammarman*, 528 F.2d 326 (4 CA 1975). Defendant alleges that his counsel purported to speak on behalf of the United States Attorney:

that "a 'working agreement' had been formulated by the defense counsel and the United States Attorney and that said agreement was breached and disavowed by both parties concerned."

See, *Machibroda v. U.S.*, 368 U.S. 487, 489, 82 S.Ct. 510, 7 L.Ed.2d 473. Even if no "working agreement" existed in fact, the voluntariness of defendant's guilty plea would be seriously in question if it was induced by representations of counsel that such an agreement was in effect. See, *U.S. ex rel. Thurmond v. Mancusi*, 275 F.Supp. 508, 516 (E.D.N.Y. 1967). *McAleney v. U.S.*, 539 F.2d 282 (1 CA 1976).

The public and the courts are seriously burdened when because of the avoidable errors of counsel, defendants are relieved from guilty pleas. Here the allegation has been made that the accused was misinformed by his privately retained counsel as to what the Assistant United States Attorney had said. Either the mistaken information was transmitted wilfully or incompetently, or else there were extenuating circumstances which, in fairness to counsel, should be made known. There is also to be entertained the possibility of perjury and collusion aimed at upsetting the original sentence. See, *McAleney v. U.S.*, supra at 286.

It must also be remembered that:

"Not by the pleadings and the affidavits, but by the whole of the testimony must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." Walker v. Johnston, 312 U.S. 275, at 287.

It is urged for the benefit of counsel against whom the representation have been raised and to preserve the dignity of this Court, a hearing be had as in U.S. v. Corbitt, 541 F.2d 146 (3 CA 1976), at 149:

We have concluded that, under the usual facts of this case, the trial court should have secured different counsel for Corbitt as the result of the disclosures on July 16 and should have had Mr. Herman testify as to exactly what he had said to Corbitt prior to the entry of a guilty plea on May 7, in order that the court could be in a position to determine whether this defendant was denied effective assistance of counsel under the standards set forth in Moore v. U.S., 432 F.2d 730 (3 CA 1970). Although the record discloses substantial prejudice to the Government in permitting the withdrawal of the guilty plea on July 16 (N.T. 11-15), waiver of constitutional rights is not to be presumed. See, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The trial court in its Order of 20 September 1977, noted that no affidavit in support of his claim of representations had been made by Petitioner/Appellant by his counsel. (P. 6). The Appellant in his pro se petition did,

and for the first time under oath, make such allegations. The procurement of such an affidavit from counsel would not be reasonably available. No intent is made herewith to impugn the reputation of counsel formerly representing Appellant, but the record does not disclaim the allegations. In other words, no affidavit was made denying the allegations.

C. LACK OF FACTUAL BASIS FOR
THE PLEA OF GUILTY

The Court may review the record for compliance with Rule 11 even though Petitioner did not specifically raise the issue in his pro se Section 2255 petition. U.S. v. Untiedt, 479 F.2d 1265, 1266 (8 CA 1973); Majko v. U.S., 457 F.2d 790, 791 (7 CA 1972).

In U.S. v. Hilyer, 543 F.2d 42 (8 CA 1976), the record disclosed that the court asked Hilyer if he was offering to plead guilty for any reason other than the fact that he was guilty, to which Hilyer replied no. The court specifically found that the guilty plea was made knowledgeably and voluntarily. The Court also stated it found "that in his Answer to Question 35, in particular, the facts there would justify a finding of guilty as to Count I if the case were tried" Question 35 refers to the question, "What acts did you do which cause you to think that you are guilty of the charge or charges to which you now want to plead guilty?" found in Hilyer's petition to enter a plea of guilty. To that question appeared this response:

with Darrell Bailey leaving Detroit, rode to
Blair Nebraska attempted to purchase license
plates with forged title.

It is evident from this response that the question still remained as to whether or not the title had traveled interstate in its forged condition. As it was stated in U.S. v. Owens, 460 F.2d 467, 469 (5 CA 1972):

It is obvious that to prove the commission of an offense under this portion of section 2314, the Government must show that the instrument traveled interstate in its forged or altered condition.

It was concluded that the judge at the guilty plea proceeding did not adequately establish on the record that there was a factual basis for the plea as required by Rule 11. The sentence and guilty plea were vacated, and defendant allowed to plead anew.

In *Rizzo v. U.S.*, 516 F.2d 789 (2 CA 1975), Rizzo withdrew his previously entered plea of not guilty and entered a plea of guilty to Count Three of the indictment. At the plea proceedings, the District Court, after determining that Rizzo was ready to plea, asked the appellant if he wished to have the third count of the indictment read to him. Appellant's attorney stated that he would waive a reading of the indictment since he had read the third count a number of times and had discussed the indictment and the facts of the case with appellant. The judge then specifically asked the appellant if he wished the third count read to him. The appellant responded, "It does not have to be read to me. I don't contest the indictment at all."

The District Court then explored the voluntariness of Rizzo's plea and his understanding of the charge against him. In so doing, the judge paraphrased the indictment and outlined the consequences of a guilty plea.

The trial judge then asked Rizzo if he had committed the offense charged in the indictment. Essentially, Rizzo asserted that Calamaras was his "dear friend," that their friendship was of many years duration, that he, Rizzo,

had personally loaned Calamaras money and has also borrowed money on Calamaras' behalf, and that he had authorized Crispino and Marino to collect the debt from Calamaras. He denied any knowledge or condonation of the use of force in making the collection, but indicated that he still wished to plead guilty to the charge.

Rizzo's attorney then stated that his discussions with the prosecutor and his review of government tape recordings had satisfied him that there was no reason for the Court not to accept Rizzo's plea of guilty. The judge concluded the allocution by stating that he believed that Rizzo was "acting voluntarily and knowledgeably and that there was a basis in fact for guilty plea."

On 6 December 1973, Rizzo was sentenced by Judge Frederick van Pelt Bryan to a twenty year prison term on Count Three to run concurrently with previous sentences imposed by Judge Gagliardi and Judge Carter. Counts One and Two of the Indictment were dismissed at the time of sentence.

On 17 October 1974, Rizzo moved, pursuant to 28 U.S.C. §2255, to vacate his sentence and set aside the judgment of conviction. In an order filed on 22 October 1974, the Judge denied the motion without a hearing.

Count Three of the indictment charged Rizzo with violating 18 U.S.C. §1951. The elements of an offense under 18 U.S.C. §1951 are (1) interference with commerce in any way or degree, and (2) extortion. See, e.g., *Stirone v. U.S.*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Extortion consists of "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or

under color of official right." 18 U.S.C. §1951(b)(2). As in the instant case, the element of actual or threatened force or violence, or fear, is essential to the crime. See, e.g., U.S. v. Billingsley, 474 F.2d 63, 66 (6 CA), cert.den. 414 U.S. 819, 94 S.Ct. 42, 38 L.Ed.2d 51 (1973); U.S. v. Tropiano, 418 F.2d 1069, 1081 (2 CA 1969), cert.den. 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.1d 530 (1970); U.S. v. Tolub, 309 F.2d 286, 289 (2 CA 1962); Nick v. U.S., 122 F.2d 660, 671 (8 CA), cert.den. 314 U.S. 687, 62 S.Ct. 302, 86 L.Ed. 550 (1941). Yet, nowhere on the face of the record did this essential element of use of force, violence or fear appear. Nor does it so appear on the record at bar.

Here, as stated in Hulsey v. U.S., 369 F.2d 284, 287 (5 CA 1966):

"[i]t would have been a simple matter for the trial court, when confronted with such equivocal response, to delay accepting the plea until further inquiry clearly established that the accused understood the elements of the crime charged . . . and that willing to enter an unequivocal admission of guilt." Id.

Similar equivocation appears in the record before the Court. (See, T-II-10-11).

In Williams v. U.S., 393 F.Supp. 260 (D.C. MN 1975), Petitioner was a resident at the Federal Penitentiary in Marion, Illinois, seeking an order vacating and setting aside the plea of guilty entered by him to the charge of " . . . willfully and unlawfully and with felonious intent, take by force, violence, and intimidation . . . approximately \$39,000.00, belonging to and in the care, custody, control management and possession of the Western State Bank, a

banking institution insured by the Federal Deposit Insurance Corporation;
in violation of 18 U.S.C. Section 2113(a)."

When questioned as to whether the plea was voluntary, the
defendant in Williams, supra, responded to questions of the court as follows:

"The Court: you to do this?	And Mr. Williams. Is anybody forcing
Mr. Williams:	No.
The Court: nature?	Or threatening you, or anything of that
Mr. Williams: Your Honor.	It all depends on what you call a threat,
The Court:	Well, I mean do you want to explain that? What
do you have in mind?	
Mr. Williams:	To hurt something I love, I'd hurt myself.
The Court:	What?
Mr. Williams: loved, I would hurt myself.	Rather than to hurt something that I
The Court: you in connection with this?	But has anybody physically threatened
Mr. Williams:	No."

At no point in the transcript of the proceedings below is there a
record of the precise act or conduct of the petitioner which allegedly constituted
his "participation in the robbery." Cf. Williams v. U.S., supra at 263.

In McCarthy v. U.S., 394 U.S. 459, 465 (1969), the Supreme Court
made it abundantly clear that the function of Rule 11 is to insure that an accused
who is unaware that his admitted conduct does not constitute the offense charged
does not plead guilty needlessly. In addition, the rule is designed to facilitate
post-conviction attacks by assuring an adequate record for review. The Court
mandated that the district court address the defendant personally "to inquire

whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea." *McCarthy v. U.S.*, supra, at 464. To avoid the injustice of a defendant pleading guilty unnecessarily, the judge must determine "that the conduct which the defendant admits constitutes the offense charged . . ." *McCarthy v. U.S.*, supra at 467. Finally, Rule 11 mandates that the judge must "develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." *Santobello v. New York*, 404 U.S. 257, 261.

In the instant case, although the examining judge had the appellant describe in a limited fashion the conduct that gave rise to the charge (see, T-II-8), it is not at all clear from the record that the accused actually did participate in the specific acts that make up the crime charged. Nor is it clear from the record that the appellant understood that certain acts by others might be imputed to himself to make him guilty of the crime charged. The command is clear from the Supreme Court that Rule 11 claims must be resolved solely on the record of arraignment and sentencing transcripts. *U.S. v. Coronado*, 554 F.2d 166 (5 Cir. 1977).

The case law is clear that a factual basis for accepting a guilty plea is not provided by requiring a defendant to admit to the conclusionary statements of the indictment or the information, *U.S. v. Untiedt*, 479 F.2d 1265 (8 CA 1973); or by acknowledgement of the elements of the offense and reiteration of a guilty

plea to those elements, U.S. v. Davis, 493 F.2d 502 (5 CA 1974); or by the reading of the indictment to a defendant, U.S. v. Cody, 438 F.2d 287 (8 CA 1971).

In the Untiedt case, the Court stated:

"The court . . . could have asked Untiedt to describe what he did or intended, or could have asked the government to outline its proof. As our Court stated in U.S. v. Cody, 438 F.2d 287, 289 (8 CA 1971), thorough judicial inquiry is required to determine that the elements of the offense were present, therefore establishing a factual basis for the plea. The inquiry which took place was far from thorough. The sentence and guilty plea must be vacated, and Untiedt must be allowed to plead anew." [Emphasis added.] 479 F.2d at 1266.

CONCLUSION

While the accuracy and truth of a prisoner's disavowal of any promises at his arraignment are "conclusively" established by his testimony at that proceeding, reasonable allegations by the prisoner after that point may create a right to further proceedings. *Crawford v. U.S.*, 519 F.2d 347, 350 (4 Cir. 1975). It is not enough for the prisoner merely to challenge the voluntariness of his plea. He must also allege sufficient facts to raise an issue about the validity of his arraignment. It is a dual requirement. *Edmonds v. Lewis*, 546 F.2d 566 (4 CA 1976). In the instant case, the Appellant/Defendant challenges the failure of the trial judge to place him under oath during arraignment, as well as raising issues of voluntariness of plea and lack of factual basis in the record for a finding of guilty.

While a mere self-serving affidavit alleging circumstances with which the trial judge should be familiar does not require an evidentiary hearing, *U.S. v. Curry*, 497 F.2d 99, 101 (5 CA), cert.den. 419 U.S. 1035, 95 S.Ct. 519, 42 L.Ed.2d 311 (1974), when the record discloses other credible documentary evidence which indicates a right to relief, an evidentiary hearing may be necessary, *Dugan v. U.S.*, 521 F.2d 231 (5 CA 1975). *Vandenades v. U.S.*, 523 F.2d 1220 (5 CA 1975). In the instant case, there is some question upon the fact of the record as to both voluntariness and factual support for a finding of guilty. Even though the requirements of Rule 11 have for the most part been

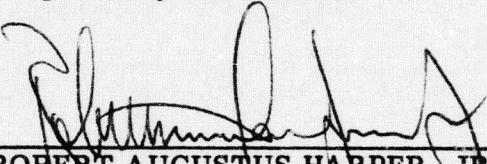
complied with, ". . . its exercise is neither always perfect nor uniformly invulnerable for subsequent challenges calling for an opportunity to prove the allegations." *Fontaine v. U.S.*, 411 U.S. 213, 215.

In addition, "It is equally clear that §2255 calls for a hearing on such allegations unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . .'" *Fontaine, supra*. [Emphasis added.] It is the position of the Appellant/Defendant that sufficient cause has been shown under the foregoing three points for the Court of Appeals to reverse and remand for further consideration of his plea.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to David G. Trager and Steven Kimelman, Office of the United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by hand/mail this 25 day of January, A.D., 1978.

Respectfully submitted,



ROBERT AUGUSTUS HARPER, JR.
Counsel for Petitioner/Appellant
735 East University Avenue
P.O. Box 804
Gainesville, FL 32602
904/377-0735

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MICHAEL FERRARA,

:

Petitioner/Appellant

:

v.

:

Docket No. 77-2142

UNITED STATES OF AMERICA,

:

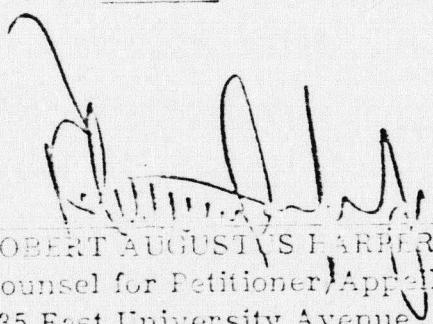
Respondent/Appellee

:

STIPULATION FOR DEFERRED APPENDIX

COMES NOW, the Appellant, MICHAEL FERRARA, by and through undersigned counsel and the Office of the United States Attorney, by and through respective undersigned counsel, pursuant to the provisions of Rule 30(c) of the Federal Rules of Appellate Procedure, and §30 of the Rules of the Second Circuit Court of Appeals, and hereby stipulate and agree that the Appendix herein shall consist of the various documents and transcripts as further identified in Appellant's "Directions to the Clerk for Preparation of the Record on Appeal."

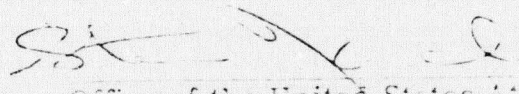
ACCEPTED AND AGREED TO this 5th day of January, A.D.,
1978.


ROBERT AUGUSTUS HARPER, JR.
Counsel for Petitioner/Appellant
735 East University Avenue
P.O. Box 804

Gainesville, FL 32602

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DAVID

BY 
Office of the United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

MICHAEL FERRARA

:

Petitioner

:

Case No. 76-CR-190-S
-76-471-

v.

:

Treated as Civ. 77C1408

UNITED STATES OF AMERICA

:

Respondent

:

DIRECTIONS TO THE CLERK FOR PREPARATION
OF THE RECORD ON APPEAL

TO: Mr. Lewis Orgel
Clerk of the Court
United States District Court
United States Courthouse
Brooklyn, NY 11201

COMES NOW, the Appellant, MICHAEL P. FERRARA, by and through undersigned counsel and pursuant to the provisions of Rules 10 and 11 of the Federal Appellate Rules and directs the filing of the Record on Appeal as follows:

1. The original complaint filed herein;
2. The original Indictment 76-CR190;
3. The superseding Indictment 76-CR190(s);
4. The pro se "Motion for Correction of an Illegal and Erroneous

Sentence Pursuant to Rule (35) Federal Rules of Criminal Procedure: For Violations of Rule 11 and the Constitution of the United States of America (But Not Limited Thereto, i.e., Among Others.) And: Motion to Withdraw Pleas of Guilty in/of the Above Captioned Cases" (sic);

5. The Order to Show Cause filed on 19 July 1977;
6. Government's Memorandum of Law and Response to Motion to Withdraw a Guilty Plea, not dated;
7. Undersigned counsel's Motion for Special Appearance of Counsel, dated 19 August 1977;
8. Petitioner's Reply to Government's Memorandum of Law in Opposition to Motion to Withdraw Plea of Guilty, dated 19 August 1977;
9. Petitioner's Motion for Rehearing, filed on 21 September 1977;
10. Petitioner's Affidavit, dated 26 September 1977;
11. Memorandum and Order, dated 20 September 1977;
12. Notice of Appeal, dated 19 October 1977;
13. Memorandum and Order, dated 12 October 1977;
14. The Transcript of Proceedings before the Honorable Thomas J. Platt, United States District Judge, on 23 July 1976;
15. Transcript of Proceedings before the Honorable Thomas J. Platt, United States District Judge, on 5 October 1976;
16. Transcript of Proceedings before the Honorable Thomas J. Platt, United States District Judge, on 11 January 1977;

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to David G. Trager, United States Attorney, and Steven Kimelman, Assistant U.S. Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by ~~hand~~/mail this 8 day of November, A.D., 1977.

Respectfully submitted,

/s/ Robert Augustus Harper, Jr.
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